IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO. 82-5305

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
Attorney General
Tallahassee, FL 32304

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
STATEMENT OF THE CASE		1 - 3
SUMMARY OF ARGUMENT		
I	THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.	3 - 4
II	THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.	4 - 5
III	PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.	5 - 6
REASONS FOR DENYING THE WRIT		
I	THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.	6 - 9
II	THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.	9 - 11
III	PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.	11 - 13
CONCLUSION		13
CERTIFICATE OF SERVICE		14

TABLE OF AUTHORITIES

Cases	Page
Alachua County Court Executive, et al. v. Kirk Anthony Alachua County Juror No. 006, ___ So.2d ___, Case No. 61,209, opinion filed July 29, 1982, 1982 Fla.L.W. 347 (Fla. 1982)	5,6,12
Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)	6,12
Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)	7
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 349 (1976)	9
Hoy v. State, 353 So.2d 826 (Fla. 1977)	10
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	8
Raulerson v. State, 358 So.2d 826 (Fla. 1978)	10
Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975)	5,11
Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)	9
State v. Dixon, 283 So.2d 1 (Fla. 1973)	4,10
United States v. Araujo, 539 F.2d 287 (2nd Cir. 1976)	8
United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)	9

Other	Page
Section 921.141(5)(d), Fla. Stat. (1977)	4,9,10,11
Chapter 74-121, Laws of Florida	5,10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO. 82-5305

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, the State of Florida, respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate, if somewhat brief. It consists of the "skeleton" of the trial, but neglects the "flesh and meat." Nonetheless, the statement is sufficient insofar as none of the issues raised by the petition directly relate to the evidence presented against Petitioner. However, Respondent would add the following:

1. Archie Sooter was indeed able to testify that Petitioner's character in regard to violence was "calm and jovial." (T 732). He was not precluded from testifying on behalf of Petitioner, as implied in the petition.

2. Martha Hitchcock did indeed testify with reference to the early background of Petitioner. Petitioner had left home at the age of 13; he did not have a natural father at that time (T 735-736). The defendant's natural father died when he was six years old (T 737). Martha Hitchcock further testified that she had never known Petitioner to be a violent person (T 737). Finally, Martha Hitchcock testified that Richard Hitchcock had made sexual advances toward her (T 737). Petitioner's inferences in his Petition for Writ of Certiorari to the contrary are not correct.

3. James Harold Hitchcock testified that he had never known Petitioner to exhibit any violence towards people, and that Petitioner acted in a playful manner with the witness' children, even having babysat for the children (T 739-740, 742, 743). Petitioner's inferences in his Petition for Writ of Certiorari to the contrary are incorrect.

4. Fay Hitchcock, the wife of James Harold Hitchcock, testified that she had never known Petitioner to exhibit any violence (T 744). Petitioner had never done anything violent towards her children, and has even babysat for her children (T 745). Petitioner's inferences to the contrary in his Petition for Writ of Certiorari are incorrect.

5. Petitioner states in his Statement of the Case that the trial judge imposed the death penalty after the jury recommended the same, even though the trial judge acknowledged that the judge and the prosecution had previously offered to Petitioner a life sentence in return for a guilty plea (which offer Petitioner declined). This statement is inaccurate. Nothing that occurred at trial bears out this statement. The Florida Supreme Court's opinion reflects the inaccuracy of this statement. In actuality, upon allocution, defense counsel responded in the negative to the question if there were any legal cause why sentence should not be pronounced.

When the defense attorney attempted to remind the court about an alleged prior plea agreement which Petitioner had rejected, the court explicitly stated that there was never any understanding because Petitioner did not want to consider any plea (TS 5-6).

SUMMARY OF ARGUMENT

I.

THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.

Petitioner misstates the facts. The trial court never offered a life sentence in return for a plea. The trial judge merely said that he would consider the prosecutor's recommendation if Petitioner pled, but Petitioner did not plead. The trial judge never agreed with the self-serving statement of Petitioner's counsel at the time of sentencing that there was an offer by the trial judge to impose life in return for a plea. To the contrary, the trial judge clearly stated that there was never any understanding, much less an offer or agreement.

In any event, the trial judge filed findings of fact which, without a doubt, affirmatively reflect that the imposition of the death penalty was premised upon the existence of statutory aggravating factors which out-weighed any mitigating factors. Having presided at both phases of the trial, the trial judge became privy to a great deal more information regarding appropriate considerations in deciding whether to impose the death penalty, than was available to him prior to this trial at the time of the alleged plea negotiations. Further, the jury had recommended a sentence of death. It wasn't the exercise of his right to a jury trial which weighed in the trial judge's mind. It was the facts and circumstances which were explicitly detailed in the jury trial, together with the jury's recommendation of

death, which weighed in the judge's mind.

In light of the above, it is apparent that Petitioner is doing nothing more than attempting to manufacture a factual scenario to support certiorari review by this Court. The issue may or may not be of significant constitutional dimension. But, in any event, the facts of the instant case do not support Petitioner's contentions in support of certiorari review.

II.

THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.

The aggravating factor at issue speaks in terms of "any rape." It is not dependent upon proof of violation of a particular statute during which the murder was committed, but is dependent upon proof of the felonious conduct identified by the crime specified (during which the murder occurred). In essence, it is the conduct, and not the actual violation of a particular statute proscribing the conduct, which supports the existence of the aggravating factor. Early on, in State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court viewed the legislative intent in promulgating the applicable aggravating factor, to include capital felonies committed as part of another dangerous and violent felony. It would therefore seem apparent that it is the felonious conduct which brings into play the existence of the aggravating circumstance in question.

In the case sub judice, although the aggravating circumstance specifies "rape," the trial court instructed the jury at the penalty phase of the proceedings on involuntary sexual battery (TAS 54). "Involuntary sexual battery" constitutes the same felonious conduct as "rape." Indeed, the law of rape in Florida was repealed in the same legislative act as that which created the law of sexual battery.

Chapter 74-121, Laws of Florida.

Petitioner cannot reasonably claim vagueness or lack of notice, not only for the reasons specified above, but also because the acts which he committed were in fact a traditional rape. The mere fact that the trial judge referred to this conduct as an involuntary sexual battery is of no avail to Petitioner. A rose by any other name is still a rose. There was no reason for Petitioner to suspect that his conduct fell outside the scope of the statute. Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Since the rape specified in the applicable aggravating factor is in fact an involuntary sexual battery, and Petitioner's conduct did indeed constitute a rape (or involuntary sexual battery), he is in no position to claim that the trial court used the term "involuntary sexual battery" rather than the term "rape," since the former term replaced the latter term. The two terms specify the same conduct, and said conduct was proven.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

Petitioner was not denied his Sixth Amendment right to a cross-section of the community as potential jurors, indeed, the record reflects that Petitioner did not suffer from any application of the statute in question, inasmuch as at least one juror was a mother with children under 15 years of age (T 157; R 63). As such, Petitioner has clearly failed to demonstrate that he was harmfully affected by the particular feature of the statute which he claims would make the statute overbroad.

True, the Florida Supreme Court has recently held this statute to be a denial of equal protection to men with children under 15 years of age. See, Alachua County Court

Executive, et al. v. Kirk Anthony Alachua County Juror No. 006, ___ So.2d ___, Case No. 61,209, opinion filed July 29, 1982, 1982 Fla.L.W. 347 (Fla. 1982). However, that case related to a male juror's Fourteenth Amendment rights, not a criminal defendant's Sixth Amendment right.

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), does nothing but favorably affect the reasoning espoused by the Florida Supreme Court in the case sub judice. Indeed, the statute in question does not deny a defendant of a jury constituting a fair cross-section of a community. Women of all ages must serve, as well as men of all ages.

In light of the fact that Petitioner's jury did indeed contain at least one woman with children under 15 years of age, and such a limited group, in any event, does not comprise a constitutionally significant class, this issue does not present a substantial federal question.

REASONS FOR DENYING THE WRIT

I.

THE DEATH SENTENCE WAS NOT IMPROPERLY IMPOSED UPON PETITIONER AFTER A PLEA AGREEMENT OF LIFE IMPRISONMENT.

Petitioner's factual premise is incorrect, and his contentions must consequently be rejected. The trial judge took part in no plea negotiations. The record reflects, and the Florida Supreme Court recognized in its opinion, that no understanding was ever reached as to an appropriate sentence should Petitioner enter a plea other than not guilty. While it may have been that Petitioner would only have entered a plea other than not guilty upon the condition that he be given a life sentence, no one, neither the trial judge nor the prosecutor, ever made any offer in this regard for, as the record reflects, Petitioner had steadfastly refrained from considering any plea.

At sentencing, when defense counsel attempted to remind the trial judge of the prior discussions with reference to the entry of a plea, the trial court explicitly stated that ". . . there was never any understanding, because your client didn't want to consider any plea." (TS 5-6). The trial judge never agreed with Petitioner's counsel's self-serving statement to the contrary. Further, Petitioner never objected to his sentence on the grounds of an alleged prior plea agreement; he merely reminded the court of the prior discussions, in mitigation. Indeed, Petitioner obviously did not feel that there was any impropriety in the sentence imposed in this regard, for there was no mention of this matter in Petitioner's Motion for New Trial as to sentencing proceeding (R 175). It is true, the Florida Supreme Court never reached the legal issues involved in the question as presented by Petitioner. What Petitioner ignores, however, is the fact that the reason the Florida Supreme Court never reached the legal issue was because there were no facts to support Petitioner's contentions with reference to the issue.

Regardless of the above, however, the record does indeed affirmatively reflect that the imposition of the death penalty was premised upon proper considerations, and not upon Petitioner's exercise of his right to a jury trial. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), indicates that a death sentence must be, and must also appear to be, based on reason rather than caprice or emotion. Pursuant to Order of the Florida Supreme Court, commonly known as a "Gardner" Order (R 212-213), the trial judge issued an Order explicitly advising the Florida Supreme Court that, in determining the sentence imposed upon Petitioner, only information which came out in the trial (both phases), and known to both the State and the defendant, was in fact considered (R 214). Furthermore, in sentencing Petitioner (R 192-193),

the trial judge filed his findings of fact (R 194-198) which, without a doubt, affirmatively reflect that the imposition of the death penalty was premised upon the existence of statutory aggravating factors which outweighed any mitigating factors. The findings were spelled out. The findings reflect a keen awareness, by virtue of the trial court's presiding at both phases of the trial, of the facts surrounding the crime, and the applicability of numerous aggravating and mitigating circumstances. Thus, the record affirmatively reflects the basis for the imposition of the death penalty, and as such affirmatively reflects that the death penalty was not imposed upon Petitioner for exercising his right to a jury trial.

It must be beyond dispute that, having presided at both phases of the trial, the trial judge became privy to a great deal more information regarding appropriate considerations in deciding whether to impose the death penalty, than was available to him prior to this trial at the time of any alleged plea negotiations. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), clearly allows for a greater sentence upon circumstances such as these, where new light has been shed upon the trial judge between an original sentence (or agreement) and a subsequent sentence after retrial (or after the agreement is abrogated and the defendant goes to trial). The important consideration is that the defendant not be penalized for exercising his constitutional rights. Herein, the record affirmatively so reflects. A show of leniency to those who exhibit contrition by admitting guilt does not carry a corollary that the trial judge indulges an improper policy (in general or in a specific case) of penalizing those who elect to stand trial. United States v. Araujo, 539 F.2d 287 (2nd Cir. 1976). Unlimited discretion as to the grant of mercy (e.g., in a plea agreement), as opposed to the imposition

of a death sentence, is certainly constitutionally permissible. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 349 (1976).

United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) is inapposite. That case struck down a state statute which mandated the death penalty upon (and only upon) a jury recommendation of such. Thus, defendants were encouraged to plea, inasmuch as the death sentence could not be imposed absent a jury. Herein, there is no encouragement to plea, since the ultimate sentence pronounced would still have rested with the trial judge after a trial. A jury recommendation of death herein would not necessarily have resulted in the death penalty, as it would have in Jackson.

The bottom line with reference to this issue is that the facts do not support the issue raised. Petitioner has done nothing more than manufacture facts and attempt to bootstrap a contention that the death penalty was imposed simply because he chose a jury trial. Nothing could be further from the truth. The death penalty was fully supported by the findings of fact. It was not imposed in an arbitrary or capricious manner. The trial judge never agreed to any lesser sentence at any time. Under the facts of the instant case, a defendant who receives the death penalty could always argue that it was imposed solely because he went to trial. Certainly, there is no substantial federal question here.

II.

THE "RAPE" PORTION OF AGGRAVATING CIRCUMSTANCE 5(d) OF SECTION 921.141, FLA. STAT. (1977) IS NEITHER VAGUE NOR CONSTITUTIONALLY INVALID.

This issue involves nothing more than the trial judge's use of the term "involuntary sexual battery" rather

than the term "rape" when he was defining the statutory aggravating factors for the jury. The two terms proscribe the same conduct, and the jury was given the definition of this proscribed conduct. A rose by any other name is still a rose. Certainly, there was nothing vague about this. It cannot go unnoticed that Section 921.141(5)(d), Fla. Stat. (1977), which specifies that it shall be an aggravating factor if the capital felony was committed while the defendant was engaged in the commission of, or flight after committing any rape, is not dependent upon proof of violation of a particular statute during which the capital felony was committed, but is dependent upon proof of the felonious conduct identified by the crime specified. In State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court viewed the legislative intent in promulgating this aggravating circumstance to include capital felonies committed as part of another dangerous and violent felony. It would therefore seem apparent that it is the felonious conduct which brings into play the existence of the aggravating circumstance in question. Indeed, the Florida Supreme Court has so interpreted that aggravating circumstance. Hoy v. State, 353 So.2d 826 (Fla. 1977); Raulerson v. State, 358 So.2d 826 (Fla. 1978).

True, the law of rape in Florida was repealed in 1974. But it was replaced in the very same legislative act by sexual battery. Chapter 74-121, Laws of Florida. Further, Respondent admits that the new sexual battery law was broken up into more categories than the old rape law. However, the definition that was given to the jury in the case sub judice was solely that of "involuntary sexual battery," which parallels the old rape statute.

The defendant cannot reasonably claim vagueness or lack of notice, not only for the reasons specified above, but also because the acts which he committed were in fact a traditional rape. The mere fact that the trial court

referred to this conduct as an involuntary sexual battery is of no avail to Petitioner. The conduct of Petitioner constituted the dangerous and violent felony of rape, which now is proscribed in Florida as "involuntary sexual battery." There was no reason for Petitioner to suspect that his conduct fell outside the scope of the statute. Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).

Therefore, the Florida Supreme Court's analysis was not equivalent to a judicial adoption of an aggravating circumstance not statutorily authorized, as Petitioner implies. It was nothing more than a recognition that the aggravating circumstance of rape was defined when the trial judge defined involuntary sexual battery. Since the rape specified in Section 921.141(5)(d), Fla. Stat. (1977), is in fact an involuntary sexual battery, and Petitioner's conduct did indeed constitute a rape (or involuntary sexual battery), he is in no position to claim that the trial court used the term "involuntary sexual battery" rather than the term "rape," since the former term did nothing more than replace the latter term. The two terms specify the same conduct, and said conduct was proven. There is no substantial federal question involved with reference to this issue. It is a matter of state law.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

It is indeed curious that Petitioner claims a Sixth Amendment violation of his right to a cross-section of the community as potential jurors, because the very class which Petitioner is speaking of was represented on Petitioner's jury! There was indeed at least one mother with children younger than 15 years old on Petitioner's jury (T 157; R 63).

Consequently, where is Petitioner's standing to even raise such a point? In essence, Petitioner has failed to bring himself within that group of defendants who may have suffered from the application of the statute in question. As such, he has clearly failed to demonstrate that he was harmfully affected by the particular feature of the statute which he claims makes it unconstitutional. A litigant should not be heard to urge the unconstitutionality of a statute when he is not harmfully affected by the particular features of the statute alleged to be in conflict with the Constitution.

Petitioner attempts to bootstrap his argument by a citation to the recent Florida Supreme Court case of Alachua County Court Executive, et al. v. Kirk Anthony Alachua County Juror No. 006, ___ So.2d ___, Case No. 61,209, opinion filed July 29, 1982, 1982 Fla.L.W. 347 (Fla. 1982). However, the Florida Supreme Court struck down the statute, not on Sixth Amendment grounds, but on equal protection grounds. The plaintiff in that case was a potential male juror with children under 15 years of age. The Florida Supreme Court recognized that this statute presented a classic distinction based upon sex. The issue did not involve a defendant's Sixth Amendment rights.

Indeed, the statute in question does not deny a defendant of a jury constituting a fair cross-section of the community. Women of all ages must serve, as well as men of all ages. Thus, Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), does nothing but favorably affect the Florida Supreme Court's analysis. Women with children under 15 years of age is simply not a constitutionally significant class. This is especially the case with reference to the facts of the instant trial, wherein this "class" was indeed represented on Petitioner's jury.

Respondent agrees with Petitioner, that a defendant has the right to a fair cross-section of the community as

potential jurors under the Sixth and Fourteenth Amendments. However, Florida's statute does not deny a defendant this right and, even if it did, Petitioner's jury was not affected by the existence of the statute. There is no substantial federal question involved in this issue under these facts.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request that this Honorable Court deny certiorari jurisdiction over the instant matter.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32304

Jay B Stevens, Asst atty Gen (for)

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent